from MMcGee

PO BOX 201706
Helena, MT 59620-1706
(406) 444-3064
FAX (406) 444-3036

Montana Legislative Services Division

Legal Services Office

Exhibit No. 5
Date 11 JAN 07
Bill No. SB 86

February 22, 2006

Mr. Jon Motl
Reynolds, Motl and Sherwood
401 N. Last Chance Gulch
Helena, MT 59601

Dear Mr. Motl:

On February 13, 2006, the Legislative Services Division received the text of your proposed initiative petition to prohibit members of the Legislature and certain other state officials from accepting employment as lobbyists within 2 years of the end of their state service (a so-called "revolving door" statute). The text of your initiative petition was reviewed pursuant to section 13-27-202, MCA, for clarity, consistency, and other factors normally considered when drafting proposed legislation. This letter constitutes the Legislative Services Division staff's recommendations concerning your proposal.

There are several concerns with your proposal as to matters of style. Those concerns are as follows (all citations are to the 2004 version of the Legislative Services Division Bill Drafting Manual (BDM)) :

1. An outline of statutory subsections begins with numbers, not letters (section 4-15).
2. A prohibition must be expressed as "may not" (section 2-5).
3. "Such" is not to be used as an article if an article provides at least equal clarity (sections 2-9 and 2-20).
4. Do not set off essential clauses with a comma (section 3-2(1)).
5. A pronoun must agree with its antecedent in number and person (section 2-10).
6. Gender-based pronouns should not be used (section 2-11).
7. The formatting of enacting clauses should follow those examples in the BDM appendices.
8. We recommend a change to the section catchline to more accurately reflect the content of the section (section 4-11).

I also have several concerns regarding the clarity of the proposed initiative measure. The first is that the meaning of "personal staff" is not defined, as are terms governing other individuals to whom the proposed initiative would apply, in section 5-7-102, MCA, made applicable by the proposed codification instruction. For this reason, you may wish to cite section 2-18-101, MCA, for a definition of "personal staff". A further concern regarding clarity of the initiative is whether it applies to persons who are in government service on the effective date of the initiative or only to those who both begin

and leave government service after its effective date. This issue is important because even though laws, including initiative measures, are usually not applied retroactively (see section 1-2-109, MCA), application to individuals who are in government service on the effective date of the initiative measure may not clearly be a retroactive application that would be prevented by the cited section if that is what is intended.

You do not state in the proposed initiative language what effect you intend the initiative to have, if enacted, upon the existing "revolving door" statute, section 2-2-105, MCA. Note that this section applies to elected officers and to department directors of the Executive Branch, as does the language of your proposal, but only provides for a 12-month "revolving door" prohibition, whereas your proposal provides for a 24-month prohibition. It's imperative that the conflict between these two provisions be addressed in your proposed initiative.

In addition to stylistic concerns and those regarding the clarity of the initiative, there are several provisions of the Montana Constitution implicated by your proposal that you also may wish to consider. Those provisions include the following: the right to engage in employment of one's choosing (Art. II, sec. 3), the right to petition the government (Art. II, sec. 6), freedom of speech (Art. II, sec. 7), the separation of powers (Art. III, sec. 1), eligibility for public office (Art. IV, sec. 4), eligibility for legislative office (Art. V, sec. 4), and eligibility for Executive Branch office (Art. VI, sec. 3). As the case law cited below points out, provisions of the U.S. Constitution establishing corresponding rights or privileges are also implicated by the proposed initiative. The largest concern raised by the case law cited below is that the initiative must be narrowly tailored to achieve your objectives.

Before beginning the discussion of constitutional implications, we note in passing that the language of the "revolving door" initiative measure that you have proposed is substantially broader than its federal counterpart in 18 U.S.C. 207. This is because the federal law prohibits lobbying by a former federal official or member of Congress only as to matters in which the former official or member of Congress "personally and substantially" participated and is thereby narrowly drawn to address only those subjects on which the official or member had influence during the previous tenure in office. For similar and other reasons, I also believe that the proposed initiative measure would, if it became law, according to the comparison of state laws on the web page of the Center for Ethics in Government, hosted by the National Conference of State Legislatures, be broader than any of the existing laws in the 28 states that currently have "revolving door" statutes. For example, even the lifetime ban imposed by Section 73(8)(a)(ii) of the State of New York's Public Officers code applies only to transactions with which the former officer was "directly concerned". Consequently, judicial and other opinions finding other state "revolving door" laws to be constitutional are not necessarily accurate indicators of the constitutionality of the initiative measure that you've proposed. I have grouped my comments below according to the various constitutional rights implicated by your proposal.

Freedom of speech. In Montana Automobile Association v. Greely, 193 M 378, 632 P.2d 300 (1981), the Montana Supreme Court impliedly determined that lobbying was a form of free speech protected by the Montana Constitution and, as a limitation on free speech, laws restricting lobbying must be supported by a compelling state interest (which was presumed in Greely, once the initiative was approved by the voters). Federal courts have held similarly. See California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972), and Taxation With Representation of Washington v. Regan, 676 F.2d 715 (7th Cir. 1982). However, an initiative measure restricting free speech must also be "narrowly tailored" to achieve its purpose. Montana Chamber of Commerce v. Argenbright, 226 F.3d 1049 (9th Cir. 2000). I question whether the language of the initiative measure that you've proposed is narrowly tailored because, unlike most revolving door statutes, no connection is required between the public officer or elected official and any previous job-related scope of influence. Without such a limitation, I believe that the proposed initiative could be found, as was the case in the 1997 opinion issued by former Idaho Attorney General Alan Lance, in connection with a proposed "revolving door" initiative measure in that state, not to have been narrowly tailored to accomplish the purpose of the initiative. An opinion by the Iowa Attorney General, Iowa Op. Atty. Gen. 93-1-4 (January 19, 1993), came to the same conclusion.

Right to engage in employment of one's own choosing. In Wadsworth v. State, 275 M 287, 911 P.2d 1165 (1996), the Montana Supreme Court held, in a case litigating the constitutionality of an administrative rule dealing with conflicts of interest, that the opportunity to pursue employment of one's own choosing is a fundamental right and that any infringement on that right must be the "least onerous" path that can be taken and still achieve the objective of the law. A law that has not been narrowly tailored for the purposes of the right to free speech, as discussed above, is likely to fail the same test for the purposes of the right recognized in Wadsworth as well.

Eligibility for public office. I have several concerns regarding the effect of the initiative measure, were it to be approved by the voters, with regard to eligibility for public office. First, Article IV, section 4, of the Montana Constitution provides that any elector is qualified to hold public office, but the Legislature may add additional qualifications. There is no provision for the adding of further qualifications by initiative measure, but the issue has not been addressed by the Montana Supreme Court. Second, as stated in Opinion No. 05-173 (December 8, 2005) of the Tennessee Attorney General, a proposed restriction on the ability of an individual to act as a lobbyist after leaving public office must be analyzed as a limit on the right to hold public office. I believe this to be a correct statement because the addition of such a sweeping prohibition as is contained in the proposed initiative could undoubtedly prevent persons who would otherwise be a candidate for public office, particularly persons now acting as lobbyists, from accepting candidacy, and any restrictions on the right to run for public office that impose restrictions in addition to those prescribed by the constitution (except when conditions may be added by the Legislature, which is not the same as adding them by initiative), including those intended to qualify better candidates for the job, are unconstitutional. State ex rel. Palagi v. Regan, 113 M 343, 126 P.2d 818 (1942). Further, in the case of

elective public office, the initiative, if enacted, would not only discourage certain persons from running for office but, because ballot access restrictions tend to restrict voting rights, would also tend to restrict electors from voting for persons who are or may later become lobbyists. See Anderson v. Celebrezze, 460 U.S. 780 (1983), and Burdick v. Takushi, 504 U.S. 428 (1992).

Eligibility for legislative office. The qualifications of a candidate for the Legislature are specified in Article V, section 4, of the Montana Constitution. My concerns regarding the effect of the proposed initiative measure on candidates for the Legislature are the same concerns as discussed above with regard to candidates for elective public office, but apply with even greater force in the case of legislative office because there are no qualifications allowed other than those stated in the constitution.

Separation of powers. The Montana Supreme Court and other states' courts have addressed the issue of whether some types of lobbying restrictions interfere with the power and duty of a state Supreme Court to regulate the practice of law and found no such interference. See Montana Automobile Association v. Greely, 193 M 378, 632 P.2d 300 (1981); State Bar of Montana v. Krivec, 193 M 477, 632 P.2d 707 (1981); Forti v. New York State Ethics Commission, 147 A.D.2d 269, 542 N.Y.S.2d 992 (1989); Ortiz v. Taxation and Revenue Department, 124 NM 677, 954 P.2d 109 (1998). However, none of those cases concerned a restriction of either the type or length contained in your proposed initiative. Additionally, some opinions do hold that regulation of attorneys under "revolving door" laws is a matter for the judiciary. See Shaulis v. State Ethics Commission, 574 Pa. 680, 833 A.2d 123 (2003). The constitutional implication is therefore listed here for your consideration.

Provided below is a copy of your proposal, edited to conform to the Bill Drafting Manual. In that copy, I have incorporated the editorial changes required by the sections of the Bill Drafting Manual cited above, but I have not made any substantive changes in your proposal that may be necessary for purposes of clarity, consistency with other laws, and the requirements of the Montana Constitution. If you accept the suggested editorial and stylistic changes, the revised text of your proposed initiative would read as follows:

BE IT ENACTED BY THE PEOPLE OF THE STATE OF MONTANA:

NEW SECTION. **Section 1. Prohibition against lobbying by former government personnel.** (1) An individual may not be licensed as a lobbyist and a principal may not directly authorize or permit lobbying by an individual if during the 24 months prior to applying for a license that individual served as a state legislator, elected state official, department director, appointed state official, or member of the personal staff of any elected state official.

(2) The prohibition in subsection (1) does not apply to an individual who seeks a license to serve as a lobbyist as part of the individual's responsibilities as an employee of state or local government.

NEW SECTION. Section 2. Codification. Section 1 is intended to be codified as an integral part of Title 5, chapter 7, part 3, and the provisions of Title 5, chapter 7, apply to section 1.

NEW SECTION. Section 3. Severability. If a part of this act is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of this act is invalid in one or more of its applications, the part remains in effect in all valid applications that severable from the invalid applications.

Only the text of the initiative is reviewed by this office. The title of the measure and the statements of implications ("FOR" and "AGAINST" language) are written by the Attorney General pursuant to section 13-27-312, MCA. The form of the petition is approved by the Secretary of State and the Attorney General pursuant to section 13-27-202(3), MCA. The Attorney General is also required to review the petition as to its legal sufficiency pursuant to section 13-27-202(3), MCA.

Please note that pursuant to section 13-27-202(1)(d), MCA, you are required to respond in writing to this office accepting, rejecting, or modifying the recommended changes before submitting a sample sheet of the petition to the Secretary of State. Your response will terminate the role of this office in this process. Further correspondence should be submitted to the Secretary of State.

Sincerely,

David S. Niss,
Staff Attorney

cc: Brad Johnson, Secretary of State

CI2196 6053dnxa.

Montana Legislative Services Division

Legal Services Office

PO BOX 201706
Helena, MT 59620-1706
(406) 444-3064
FAX (406) 444-3036

February 24, 2006

Mr. Jon Motl
Reynolds, Motl and Sherwood
401 N. Last Chance Gulch
Helena, MT 59601

Dear Mr. Motl:

This morning I discussed with Greg Petesch my letter of February 22, 2006, to you providing my written comments upon review of your proposed initiative measure. He has suggested two more issues implicated by your proposed initiative measure that should be brought to your attention.

The first issue is the rationale why your proposed initiative does not apply to the personal staff members of appointive as well as elected state officials. Despite the fact that the provisions of Title 2, chapter 18, MCA, relying upon the definition of "personal staff" in section 2-18-101, MCA, apply only to the staff of elected officials, there may be an equal protection issue in not applying the prohibition in the proposed initiative to other "personal staff" as well. It seems to me that that issue would be particularly important if, because the proposed initiative burdens a form of free speech, a court holds that the classifications inherent in the proposal are subject to strict scrutiny.

Additionally, I would also point out that the proposed initiative is written not to apply to the staff of the Legislature, as some states' "revolving door" statutes do. This exclusion, although it may have a rational basis, may also not survive a strict scrutiny test required when the fundamental right of free speech is abridged.

Please consider the foregoing comments, in addition to those in my letter of February 22, 2006, for the purposes of your reply to this office that's required by section 13-27-202(1)(d), MCA.

Sincerely,

David S. Niss

CC: Secretary of State Mr. Brad Johnson

CI2196 6055dnxa.